Before The

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

TO: The Commission

REPLY COMMENTS OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

I. EXPLICIT NATIONAL RULES

Congress adopted a new regulatory paradigm whereby carriers obtain and provide services and facilities pursuant to co-carrier arrangements at jurisdictionally unseparated rates. It would be impossible to assign the FCC exclusive jurisdiction over the interstate aspects of such arrangements, while assigning the states exclusive jurisdiction over the intrastate aspects, without entirely scrapping the 1996 Act.

The FCC should adopt explicit national rules to prevent the Bell Companies from stringing out the implementation of Section 251(c) for years, while seeking entry into the in-region interLATA market (and thereby the full-service market) immediately. Explicit national rules are needed urgently to make the negotiation process work, to establish the business certainty and regulatory uniformity necessary to promote new entry, and to reduce litigation and regulation to a minimum. The ILECs have shown a remarkable propensity for misreading even clearly-written statutory provisions, removing any possible doubt over the need for explicit national rules.

II. UNBUNDLED NETWORK ELEMENTS

The ILECs are deliberately misreading clear statutory provisions, and feigning that network elements are beyond their technological grasp, to defeat broad-based entry into the marketplace. The FCC must adopt the unbundled local switching ("ULS") element as the virtual lease of switch capacity based upon the "switch platform" model in Illinois. The Hearing Examiner in the seminal Illinois proceeding has concluded that the ULS element is technically feasible and mandated by Section 251(c)(3). The ILECs can and will implement this element if required to do so, and the FCC should so require.

The statutory language repudiates the ILECs' argument that requesting carriers must obtain at least one network element from a carrier other than the ILEC. Similarly, Section 251(c)(3) does not permit ILECs to impose access charges for customers whom they have lost to competing carriers through the purchase of network elements. Moreover, the statutory words openly debunk the ILECs' self-serving argument that carriers cannot combine all elements into services which the ILECs provide at retail. The Department of Justice had no difficulty concluding that the ILECs' arguments are openly hostile to the pro-competitive words and objectives of the 1996 Act, and the FCC should reject each and every ILEC request to write restrictive conditions into Section 251(c) that Congress did not place there.

It is important to give full meaning to the last sentence in Section 251(c)(3), which requires ILECs to provide elements "in a manner" that permits carriers to combine them into services. Given the ILECs' continued refusal to heed that directive, the FCC should require them to (i) develop automated PIC-like procedures to permit carriers to turn up local customers as quickly, efficiently and inexpensively as ILECs can turn up long distance customers; and (ii) provide the operational and back-office systems necessary to combine discrete service elements into services that the competitive carriers design.

III. STAND-ALONE EXCHANGE ACCESS

As written, Sections 251(c)(2) and (c)(3) entitle all carriers to enter into co-carrier arrangements with ILECs to obtain stand-alone exchange access for their own long distance services. The Department of Justice agrees that Congress intended to entitle all carriers to obtain stand-alone exchange access on a co-carrier basis under Section 251(c). While CompTel continues to believe that Section 251(c)(2) does not require a carrier to "offer[]" exchange access to others, CompTel agrees with the Department of Justice that, at a minimum, carriers who "offer[]" exchange access to others must be permitted to supply it for their own long distance operations as well.

To clear away the smoke-screen of alleged public policy issues stemming from the inclusion of exchange access in Section 251(c), CompTel proposed an interim plan, subject to several conditions, whereby the FCC would grant a blanket waiver to expire at the completion of the universal service proceeding so that the ILECs would continue to supply stand-alone exchange access for toll traffic, as they do today, pursuant to their interstate and intrastate carrier-to-customer access charge tariffs. This plan removes any possibility that interpreting Section 251(c) according to its plain language, and adopting the necessary implementing rules, would cause ILECs to raise local rates to compensate for lost revenues.

IV. PRICING BASED ON ECONOMIC COSTS

Sections 251(c) and 252(d) require that the rates for interconnection and network elements must be based on economic costs, and Total Service Long Run Incremental Costing

("TSLRIC") is the only methodology on the record in this proceeding which comports with the statutory standard. CompTel strongly endorses the Department of Justice's recommendation in favor of TSLRIC pricing as adjusted to reflect the forward-looking joint and common costs associated with operating the network.

The ILECs' consistent argument that they are entitled to recover "all costs" or "total costs" is flatly contrary to Congress' prohibition against rate-based methodologies. The FCC correctly rejected the so-called efficient component pricing rule ("ECPR") because it locks in monopoly rents and deters new entry. The ILECs themselves oppose the ECPR when they have the perspective of the new entrant rather than the incumbent monopolist. There is no serious argument that adopting a TSLRIC standard for interconnection and network elements under Section 251(c) involves a taking of private property without just compensation in violation of the Fifth Amendment.

V. LOCAL EXCHANGE RESALE

The Department of Justice correctly recognized that meaningful wholesale rates for local exchange services under Section 251(c)(4) are crucial for competitive conditions in the full-service market. The FCC should adopt a methodology to instruct state commissions in removing all retail-related costs, including overheads allocated to retail activities, when deriving the wholesale rate. A carrier who purchases local exchange service from an ILEC is a wholesale customer, not a retail customer. When implementing the statutory mandate of a "wholesale" rate reflecting avoided retail costs, the FCC should keep in mind that the larger ILECs will routinely obtain wholesale rate reductions of 50-80% in the long distance market.

The FCC should stand firm against the barrage of restrictions and conditions which the ILECs desire to place upon local exchange resale. Section 251(c)(4) authorizes state commissions to adopt one and only one resale restriction involving the resale of class-restricted services. As the Department of Justice observes, these types of restrictions, singly or in the aggregate, would permit ILECs to manipulate their local exchange services and rates to effectively prevent competitive entry into portions or all of the local market. In general, the FCC should clarify that the ILECs may not impose any terms and conditions upon requesting carriers which unreasonably restrict resale, even if they impose such terms and conditions upon end-user customers.

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WASHINGTON, D.C.

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TO: The Commission

REPLY COMMENTS OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby replies to the comments filed on May 16, 1996 regarding the Commission's Notice of Proposed Rulemaking (FCC 96-182) [hereinafter "NPRM"] to implement the Telecommunications Act of 1996 ["1996 Act"] in the above-captioned proceeding.[1]

Introduction

Today's local market conditions provide conclusive evidence of the inadequacy of existing policies to establish meaningful options for efficient entry. A principal reason why Congress adopted the 1996 Act was to move aggressively beyond the current market situation by adopting a new co-carrier paradigm -- and by directing the FCC to adopt implementing rules -- to ensure that carriers have efficient entry opportunities for the first time. Therefore, when the incumbent local exchange carriers ("ILECs") urge the FCC to adopt rules reflecting current market conditions, such as by limiting network elements to what the ILECs or industry standards

[1] CompTel endorses and incorporates by reference, the proposed Commission rules being filed today by the Telecommunications Carriers for Competition.

support today, or by relying exclusively upon "negotiations" in preference to explicit rules, the FCC should understand that the ILECs are trying to defeat, not facilitate, the provisions and purposes of the 1996 Act.

The FCC must adopt the rules necessary to ensure efficient broad-based entry throughout the telecommunications market. As Congress foresaw, what once were arguably discrete market segments are now converging into a single full-service marketplace. Even the ILECs acknowledge that the common end-point for most carriers under the 1996 Act is the full-service marketplace.[2] It bears repeating that the full-service market will only be as competitive as its least competitive market segment (which is local services today) and that competitive conditions in all market segments, including long distance will be impaired if the ILECs enter the full-service market while other carriers lack meaningful options for entering the local market.[3] Without efficient options for broad market entry the post-1996 Act market will be less competitive overall than the pre-1996 Act environment.

Perhaps in an effort to hide the stark disparity in competitive conditions and opportunities between local and long distance markets today, U S West and other ILECs seek to portray the principal issue as the re-creation of AT&T as an all-powerful vertically-integrated monolith. So long as the FCC adopts TSLRIC pricing, fully opens the local network through the provision of useful network elements, and prevents carriers from obtaining non-cost based volume discounts, there is no real danger that any carrier will dominate the industry. The real

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[2] E.g., SBC Comments at 3.

[3] See CompTel Comments at 26.

danger is that ILECs will enter the full-service market by obtaining long distance capacity at 50-80% reduced wholesale rates and turning up new customers quickly, efficiently and inexpensively through existing PIC-change and back-office systems, while other carriers will be unable to assemble competing full-service products because they will not have access to equivalent PIC-change and back-office systems.

Throughout their comments, the ILECs seek to distract the FCC from interpreting the 1996 Act according to its plain words, effectively arguing that the Commission's primary obligation is to protect their access revenues from competitive erosion. CompTel does not accept this premise, but in order to prevent this short-term issue from coloring the immediate task of interpreting the seminal provisions in the 1996 Act -- interpretations that will result in permanent changes in the telecommunications industry -- CompTel proposed an interim plan in its comments that would produce a clean separation between this proceeding and any significant revenue impact on the ILECs (or rate impact upon consumers).[4] By granting a blanket waiver permitting the ILECs to continue imposing intrastate and interstate access charges for stand-alone exchange access for a specific interim period ending with the completion of the universal service proceeding,[5] the FCC can dissolve the ILECs' public policy smoke-screen and complete its crucial task in this proceeding of implementing the 1996 Act according to its plain words and Congress' equally plain intentions.

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4 See CompTel Comments at 81-87 (Section V).

5 See Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking, CC Docket No. 96-45 (rel. Mar. 8, 1996).

I. THE FCC MUST ADOPT EXPLICIT NATIONAL RULES TO IMPLEMENT SECTION 251 OF THE 1996 ACT

A. The 1996 Act Embodies A New Paradigm Whereby Carriers Can Obtain Facilities From Each Other As Co-Carriers At Jurisdictionally Unseparated Rates

[NPRM, paras. 2, 37-40, 120.] The 1996 Act creates a "new model"[6] and a "new regulatory paradigm"[7] whereby carriers obtain and provide services and facilities on a jurisdictionally unseparated basis pursuant to co-carrier arrangements. As CompTel showed in its comments, "[t]he **co-carrier** regime is fundamentally different than any regime that either Congress or the FCC has established in the past, and it is completely outside the rules, policies and precedents governing the pre-existing **carrier-to-customer** regime of jurisdictionally separated intrastate and interstate services and facilities."[8] The Department of Justice also interprets the 1996 Act to establish a new paradigm of jurisdictionally unseparated co-carrier arrangements: "[I]nterconnection and access to network elements [are] not limited to intrastate

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6 See H.R. Rep. No. 458, 104th Cong., 2d Sess. 121 (1996).

7 See 141 Cong. Rec. S7881-2, S7886 (June 7, 1995) (Statement of Sen. Pressler); see also Wyoming Public Service Comm'n Comments at 18 (interpreting Sections 251(c)(2) and (c)(3) as mandating co-carrier arrangements); Illinois Commerce Commission Comments at 40 (supporting jurisdictionally unseparated pricing principles).

8 CompTel Comments at 15 (emphasis supplied). It bears emphasis that this regime applies only to entities qualifying as "telecommunications carriers" under the 1996 Act. E.g., GTE Comments at 72 n.99. It does not ensure equivalent treatment between end users and carriers as suggested by MFS. MFS Comments at 53.

use, and thus the costs charged to requesting carriers should be determined on an unseparated basis."[9]

It is impossible to interpret and apply the provisions of the 1996 Act within the traditional, pre-existing framework of jurisdictionally separated interstate and intrastate services and facilities. As CompTel showed in its comments, numerous provisions assign jurisdiction to the FCC and state commissions without regard to the interstate or intrastate nature of the services or facilities.[10] Congress granted the FCC express authority over what are inarguably intrastate services, facilities and markets, while Congress granted state commissions express authority over what are inarguably interstate services, facilities and markets.[11] To assign the FCC exclusive jurisdiction over the "interstate" aspects of co-carrier arrangements, while assigning states exclusive jurisdiction over the "intrastate" aspects of such arrangements, would involve more than a mere re-writing of the 1996 Act; it would require scrapping the legislation in its entirety and starting from scratch.

The FCC is fully empowered to -- and indeed is compelled to -- apply Section 2(b) in a way that maintains the integrity of the 1996 Act. Such action has been sanctioned by the Supreme Court in the past, where the Court found it necessary to refuse to give effect to

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[9] Department of Justice ("DOJ") Comments at 41 & 50 n.23.

[10] CompTel Comments at 15-16. The ILECs do not dispute that Section 251, and the FCC's rulemaking authority under Section 251(d), apply to intrastate services and facilities. <u>E.g.</u>, GTE Comments at 3 ("Sections 251 and 252 apply in largest part to intrastate services").

[11] CompTel Comments at 15-19.

provisions of Section 2(b) that directly conflicted with other provisions of the Communications Act of 1934.[12] This is a case where any overly technical reading of Section 2(b) cannot control because it would obliterate essential provisions of the 1996 Act and subvert Congress' express intention of establishing national policies governing both intrastate and interstate communications services. The controlling principles of statutory interpretation are that the 1996 Act should be construed to avoid rendering its provisions nugatory and to promote Congress' purposes in adopting the statute.[13] That approach is particularly appropriate here since, as the FCC found, Congress adopted Section 251 after Section 2(b) and, therefore, must be presumed to have intended that Section 251 would take precedence over any contrary implications in Section 2(b). **[NPRM, para. 37.]**

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12 The Supreme Court has established that Section 2(b) will not control when a strict construction of that Section would be inconsistent with the clear purpose of the Communications Act. For example, the Court found that the FCC has jurisdiction over intrastate communications, contrary to Section 2(b), where the intrastate and interstate components of an FCC regulation or policy are not severable. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). Similarly, the Supreme Court noted that Section 2(b) could be set aside based on "unambiguous or straightforward" statutory provisions to the contrary found elsewhere in the Communications Act of 1934. Id. at 377 & 379.

13 E.g., FTC v. Retail Credit Co., 515 F.2d 988 (D.C. Cir. 1975)(there is a presumption against interpreting a statute in a way which renders it ineffective); Salomon Forex, Inc. v. Tauber, 8 F.3d 966 (4th Cir. 1993)(court construing statute presumes that statute is not self-contradictory or otherwise irrational); Bailey v. City of Lawrence, Ind., 972 F.2d 1447 (7th Cir. 1992)(courts are bound to construe a statute to avoid absurd results and favor public convenience).

B. The FCC Should Adopt Explicit National Rules To Promote Congress' Objectives Of Creating A Pro-Competitive and Deregulatory Environment

[NPRM, paras. 25-33.] In promoting negotiations over explicit national rules, the Bell Companies are simply seeking the ability to delay the implementation of effective interconnection, and to further strengthen their negotiating position vis-a-vis competitive carriers. Absent explicit rules, the Bell Companies could frustrate the implementation of Section 251(c) while they attempt to obtain certification to enter the in-region interLATA market, thereby conferring upon themselves an enormous competitive advantage in the full-service marketplace. The Department of Justice astutely notes that "[t]here is no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent clear legal requirements that they do so."[14] U.S West's argument that the FCC could intervene with "coercive" regulation at some undefined subsequent point when it is clear that negotiations have failed is a palliative.[15] By that time, U S

14 DOJ Comments at 9-10; see also Idaho Public Utilities Commission Comments at 6 (recognizing superior ILEC bargaining power); Illinois Commerce Commission Comments at 4 (same).

15 See U S West Comments at 4. SBC argues that its recent agreement with American Telco, Inc. ("ATI") shows that the negotiation process works effectively without explicit national rules. SBC Comments at 11. In fact, the ATI agreement is largely silent as to the most significant and contentious requirements of the 1996 Act; the agreement only selectively addresses SBC's obligations under Section 251 (there are no provisions concerning unbundled loops or local switching, for example) and there is no demonstration that its prices would comply with the pricing standards of Section 252 (or, as the Act requires for in-region interLATA entry, Section 271). As such, the ATI agreement does nothing to diminish the need for national rules.

West could expect to be months or years into the in-region interLATA market with a leg-up on all other full-service competitors.

The FCC must adopt explicit national rules under Section 251(c) to ensure that the Bell Companies cannot enter the in-region interLATA market until they have fully implemented the measures necessary to ensure open entry into the local market. Further, there is little doubt that explicit national rules will facilitate and accelerate the negotiation process, establish the business certainty and regulatory uniformity necessary to promote new entry, ensure that carriers have an actual rather than merely theoretical ability to become full-service providers under Section 251(c), and reduce regulatory, administrative and litigation burdens to a minimum. As the Department of Justice succinctly notes, "[c]lear national standards are critical to assure that entrants will have prompt access to essential facilities or services of incumbent monopolists, on economically appropriate terms."[16]

Without explicit national rules, potential new entrants would be forced to negotiate and litigate myriad issues in every single state. The ILECs have already served notice that no statutory provision is so plainly written that they cannot read it to say something entirely different. The ILECs' arguments that only facilities-based local exchange carriers can obtain interconnection under Section 251(c)(2), that requesting carriers must obtain at least one network

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16 DOJ Comments at 9. It is worth noting that numerous state commissions have supported the need for some federal rules to implement Section 251. E.g., Texas Public Utility Commission Comments at 8 (minimum federal standards helpful to state commissions in implementing Section 271); New York Public Service Commission Comments at 25 (minimum rules beneficial for network elements); Oklahoma Corp. Commission Comments at 2 (supporting national framework under Section 251).

element elsewhere, that ILECs still get access charges even after a competing LEC has won the customer in the marketplace, and that competing LECs cannot combine elements to provide services that compete with the ILECs' retail services are just a smattering of the efforts by the ILECs to re-write the 1996 Act to undermine new entry. Two of the most outrageous are USTA's suggestion that a Bell Company satisfies its Section 271 obligation merely by agreeing to negotiate with another carrier,[17] and SBC's claim that the arbitration decisions of state commissions are not binding.[18] The positions taken by the ILECS in their comments in this proceeding remove any possible doubt concerning the compelling need for explicit national rules.

II. THE FCC SHOULD ADOPT RULES SPECIFYING THE NECESSARY UNBUNDLED NETWORK ELEMENTS AND REQUIRING ILECS TO PROVIDE THE NECESSARY OPERATIONAL SYSTEMS AND SUPPORT

A. The FCC Should Require The ILECs To Adopt An Unbundled Local Switching Element

[NPRM, paras. 74-116.] Unbundled local switching ("ULS") may be the single most important network element under Section 251(c)(3).[19] Without unbundled switching capacity, the ability of new entrants to combine network elements into their own services will be so severely restricted as to be more theoretical than actual. The FCC should establish the ULS

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[17] USTA Comments at 22 n. 30.

[18] SBC Comments at 103.

[19] Switch unbundling is specifically required by Section 271(c)(2)(B)(vi) of the 1996 Act.

element as the virtual lease of switch capacity, as is being undertaken in Illinois,[20] not the mere unbundling of a so-called port.

Several parties, mostly ILECs, have opposed the ULS element on the ground that it is not "technically feasible" today within the meaning of Section 251(c)(3). That objection is wrong on both policy and technical grounds. First, it is imperative that the FCC establish a dynamic rather than a static approach to technical feasibility to blunt the ILECs' incentive to thwart competitive entry by refusing to cooperate in efforts to develop new network elements. Second, for self-serving reasons, the ILECs interpret "technically feasible" to mean what has already been fully achieved and implemented today on an off-the-shelf basis.[21] That approach would permit them to stop new entry in its tracks by refusing to move forward with new technology or industry standards, or otherwise to develop new network elements that are "technically feasible" even if they do not exist fully-formed today. The FCC cannot let the ILECs dictate the existence and timing of "technical feasibility," and thereby control what network elements are available under Section 251(c)(3), if new entry under Section 251(c)(3) is to be meaningful.

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[20] See CompTel Comments at 33-35; see also American Communications Services, Inc. Comments at 40-41 ("local switch unbundling must make available the functionality resident within the switch itself, including the capacity to switch traffic from line to line, line to trunk, trunk to line or trunk to trunk").

[21] E.g., SBC Comments at 41-43 (network element not technically feasible absent industry-wide technical standards); Ameritech Comments at 12-14 (network element not technically feasible unless it is currently being provided by ILECs).

Further, any possible doubt that the ULS element is technically feasible was removed by the recent proposed order of the Hearing Examiner in Illinois.[22] With the full support of the Staff at the Illinois Commerce Commission, that order finds, correctly, that the switch platform is "technically feasible" and that Section 251(c)(3) "clearly mandates" the ULS network element.[23] Ameritech was ordered to file implementing tariffs within 30 days and Centel within 90 days. The FCC should take careful note of Ameritech's persistent opposition to the "technical feasibility" of the ULS element, and the emphatic rejection of that position by the Staff and the Hearing Examiner at the Illinois Commerce Commission.[24]

Bell Atlantic's inexplicable assertion that every state to consider a switch platform proposal has rejected it[25] ignores that Illinois is the first state to address such a proposal on the merits (and it has recommended approval of the proposal), and that Trial Staff at the

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[22] See Hearing Examiner's Proposed Order, AT&T Communications of Illinois, Inc., Docket Nos. 95-0458 & 95-0531, before the Illinois Commerce Commission, May 16, 1996 [hereinafter "Illinois HE Order"].

[23] Illinois HE Order at 64-67.

[24] It is worth noting that Centel supported, and agreed to tariff, the switch platform in Illinois, even though its affiliated company Sprint raised concerns that the switch platform is not sufficiently defined. See Illinois HE Order at 62; Sprint Comments at 32-39.

[25] Bell Atlantic Comments at 26. On the basis of the Illinois HE Order, the FCC should disregard the Declaration by Ross M. Richardson, Attachment 4 to Bell Atlantic's comments, as it relates to the switch platform proposal in Illinois.

Pennsylvania Public Utility Commission has already rejected Bell Atlantic's views by endorsing the ULS element in concept.[26]

By turning their backs on the switch platform, the ILECs are trying to coerce the FCC into limiting the local switching element to a mere unbundled port. As CompTel demonstrated in its comments, "a so-called port simply permits a carrier to use its own local loop to access the ILEC's network, but it does not permit a carrier to define its own services."[27] As even the ILECs concede, a carrier who obtains a port is locked in to the ILEC's local services.[28] Unbundled ports force the new entrant to purchase the ILEC's existing retail services, thereby undermining a central goal of the 1996 Act in general, and Section 251(c)(3) in particular, of imposing competitive pressure upon the ILECs' local service offerings.

One of the main reasons why the ILECs oppose the ULS element may be their transparent desire to force carriers to purchase optional functionalities resident in the switch solely as high-margin retail services. As we show in more detail below, an ILEC cannot evade

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26 See CompTel Comments at 33 n.31 (noting support for ULS element by Office of the Trial Staff for the Pennsylvania Public Utility Commission); see also Ohio Public Utilities Commission Comments at 36 (not opposed to switching platform as network element). U S West's suggestion that the ULS element would require physical partitioning of the switch is wrong. U S West Comments at 55. ULS permits carriers to designate the features associated with lines and the routing of calls, but it does not mandate or suggest direct access to the switching fabric itself. See Sprint Comments at 33.

27 CompTel Comments at 34.

28 E.g., Bell Atlantic Comments, Att. 3 at 14 (Declaration of Raymond Albers) ("[c]o-carriers that lack a switch can combine the switch port with existing switched services . . . to offer local service") (emphasis supplied).

the statutory duty to offer a network element through the expedient of tariffing it as a retail service offering. In Illinois, the Hearing Examiner held that the 1996 Act unambiguously rejected Centel's position that optional features should be excluded from the ULS element.[29] The 1996 Act's definition of "network element" directly addresses and resolves this issue. A "network element" includes the "features, functions, and capabilities" that are provided by means of the ILEC's facility or equipment. Those plain words cannot be interpreted to permit the ILECs to retain their monopoly over optional functions by labeling them as retail service offerings.

B. Sections 251(c)(3) And (c)(4) Are Discrete Mechanisms For Entering The Local Market

[NPRM, paras. 74-157 & 172-188.] Throughout their comments, the ILECs ask the FCC to adopt a phalanx of restrictions and conditions (all of which, not coincidentally, would deter entry by competing carriers) purportedly to ensure that Sections 251(c)(3) and (c)(4) are fully distinct from each other. We refute each of the ILECs' proposed restrictions and conditions in the following sections. In the process, a more fundamental point should not be lost. As both CompTel and the Department of Justice demonstrated in their comments, Sections 251(c)(3) and (c)(4) inherently provide discrete entry options without the need for any restrictions which Congress did not see fit to write into the statute.[30]

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[29] See Illinois HE Order at 67.

[30] CompTel Comments at 3-4 & 24-25; DOJ Comments at 49-50.

A carrier who purchases network elements under Section 251(c)(3) to serve an end-user customer effectively replaces the ILEC as the customer's local exchange carrier. The business relationship between the ILEC and the customer ends completely. The competing carrier is now responsible for providing all services and traffic to the end-user customer, including local exchange service as well as originating and terminating exchange access. In addition, the carrier has the ability to combine network elements to produce new services of its own design, and the carrier purchases network elements based on unseparated economic costs under Section 252(d). By contrast, a carrier who resells an ILEC's local exchange service at wholesale rates under Section 251(c)(4) replaces the ILEC only as the end-user customer's local exchange carrier; the ILEC usually will continue to provide originating and terminating exchange access to the customer. Further, the reseller is limited to the retail services designed and offered by the ILEC, and the ILEC's wholesale rates are derived from its retail local exchange rates.

The Department of Justice agrees with that analysis. It states:

> "The Department believes that the use of unbundled elements under Section 251(c)(3) is substantially different from the wholesale for resale service mandated by Section 251(c)(4). One critical difference is that purchasers of unbundled elements under Section 251(c)(3) will, under our understanding of the Act, be able to participate fully in the provision of access services using those elements, while the opportunity to resell ILEC services under [Section] 251(c)(4) would be limited to services 'provided at retail to subscribers who are not telecommunications carriers,' that is, end user services. . . . In addition, under the wholesale for resale option of Section 251(c)(4), the reseller entrant is limited to the services being offered at retail to its customers. The new entrant would have little opportunity to differentiate the service offering from that provided by the ILEC."[31]

[31] DOJ Comments at 49-50. The Department also agrees that network elements under Section 251(c)(3), but not wholesale local exchange services under Section 251(c)(4), would be priced on the basis of unseparated costs. DOJ Comments at 50 n.23.

As CompTel and the Department of Justice have shown, it cannot reasonably be disputed that Congress has already made Sections 251(c)(3) and (c)(4) into fully distinct entry options.

It also bears emphasis that each option will play a different role in carriers' decisions to enter the local market.[32] While providing service via network elements may be a more robust form of entry, it will occur unevenly over time and across geographic regions due to its relative complexity. By contrast, entry through resale should occur quickly on a broad geographic basis so that carriers can begin to provide full-service offerings as soon as possible. Further, entry through network elements may never be economically feasible in areas where the carrier has dispersed customers or limited traffic volumes, while resale provides a means of entering the local market on a ubiquitous basis. It is likely that most carriers will rely upon resale for some of their full-service offerings, and that some carriers will rely upon resale for all of their offerings, on a permanent basis. Because Section 251(c)(3) and (c)(4) will play quite different roles in carriers' decisions to enter the local market in the immediate future and over the long term, the FCC should adopt the rules necessary to develop each option to its fullest marketplace potential.

Nor is there any inconsistency between Section 251(c)(3), as written, and Congress' objective of encouraging facilities-based competition. In the first place, as the FCC has found and even some ILECs have grudgingly conceded,[33] Congress sought to encourage

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[32] See CompTel Comments at 3-4 & 24-25.

[33] E.g., NYNEX Comments at 45; Ameritech Comments at viii & 85.

efficient entry of all kinds, and it did not seek to encourage facilities-based entry where it is not efficient. **[NPRM, para. 75.]** More importantly, permitting carriers to enter the full-service market through Sections 251(c)(3) and (c)(4) is a crucial stepping stone to the future development of facilities-based competition. As the Department of Justice noted:

> "Congress realized that many entrants would not be able to enter the market quickly with their own facilities. Therefore, it allowed them several means of entry -- resale, via access purchase, and facilities-based (partial or complete). Allowing entrants to start out by purchasing some or all of the unbundled elements allows them the flexibility to gradually introduce their own facilities into their networks while receiving from the ILEC only those features and functions that they are not able to provide themselves. This advantage will be a major factor in lowering the barriers to entry into the local market, and is thereby crucial to the steady development of competitive local markets in the manner envisioned by Congress."[34]

A plain-language reading of Sections 251(c)(3) and (c)(4) is consistent with, indeed essential for, the development of efficient competition as Congress intended.

C. The FCC Should Clarify That Requesting Carriers May Obtain Any Or All Network Elements From ILECs

[NPRM, paras. 92-116.] Numerous ILECs make the bald assertion that a carrier cannot purchase network elements in order to combine them into a telecommunications service under Section 251(c)(3) unless the carrier obtains at least one network element from a competing LEC or provides the element itself.[35] The ILECs' self-serving approach is repudiated by the

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[34] DOJ Comments at 50.

[35] E.g., NYNEX Comments at 5, 30, 37-38; USTA Comments at 62; Pacific Comments at 25; U S West Comments at 11; GTE Comments at 27.

plain language of the statute; there is no limitation in the words of Section 251(c)(3) on a carrier's ability to obtain all network elements from the ILEC. The ILECs are trying to put up as many roadblocks as possible to deter new entry by competing carriers.[36] The Department of Justice has concluded that the ILECs' proposed interpretation of Section 251(c)(3) "would frustrate the competitive policies of the Act and create significant practical problems for the Commission."[37] Congress entitled each carrier to purchase network elements in order to combine them into services of its own selection "regardless of whether any of its own facilities are used in providing the service."[38]

The ILECs' proposed interpretation would lead to enormous practical and administrative problems. The FCC would have to decide whether to require the requesting carrier under Section 251(c)(3) to provide one network element "on its own" or whether it could

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36 For different but no less self-serving reasons, one competitive local exchange carrier ("CLEC") supports requiring long distance carriers to obtain at least one network element from a provider other than the ILEC. E.g., MFS Comments at 65-66. First, the Commission should recognize that it is as much in MFS' narrow interests to delay entry by competitive carriers as it is in the ILECs' interest. The Commission should judge MFS' comments accordingly. Second, any such requirement would force long distance carriers to purchase network facilities from CLECs (assuming that the CLECs are willing and able to provide the service at reasonable rates) even when it is more efficient to obtain those facilities from the ILEC. Such a requirement was never contemplated by the 1996 Act, and would constitute an impermissible barrier to competitive entry. The 1996 Act was designed to engender efficient competition, not regulatory hand-outs.

37 DOJ Comments at 49. In an order dated May 16, 1996, the Hearing Examiner in the Illinois proceeding rejected the assertion by Ameritech and MFS that requesting carriers must combine "their own facilities" with the ILEC's network elements. See Illinois HE Order at 65.

38 DOJ Comments at 49.